Office - Supreme Court, U.S.
FILED
SEP 4 1984
ALEXANDER L. STEVAS

No. 84-349

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

ELLEN GIBNEY, *et al.*,
Appellants,

-v-

TOLEDO FEDERATION OF TEACHERS, *et al.*,
Appellees.

On Appeal From the Court of Appeals of Ohio, Sixth Appellate District

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I. IS A STATE STATUTE REPUGNANT TO THE FIRST AMENDMENT'S BAN ON LAWS COERCING POLITICAL AND IDEOLOGICAL CONFORMITY WHERE THE STATUTE, AS APPLIED BY THE STATE'S COURT, LICENSES A LABOR UNION — PRIOR TO ANY ADJUDICATION OF THE AMOUNT OF A CONSTITUTIONALLY PERMISSIBLE AGENCY-SHOP FEE — TO SPEND A DISSENTING EMPLOYEE'S COMPULSORY FEES FOR POLITICAL AND IDEOLOGICAL PURPOSES UNRELATED TO COLLECTIVE BARGAINING?

II. MAY A STATE COURT, IN ADMINISTERING THE STATE'S SYSTEM OF COLLECTIVE BARGAINING FOR PUBLIC EMPLOYEES, CONSTITUTIONALLY RENDER A JUDGMENT AGAINST A DISSENTING EMPLOYEE FOR A FEE EQUAL TO MEMBERSHIP DUES AND REQUIRE THE EMPLOYEE TO GO THROUGH THE UNION'S INTERNAL REBATE PROCEDURE BEFORE IT WILL HEAR AND DETERMINE THE EMPLOYEE'S DEFENSES AND COUNTERCLAIM ALLEGING THAT THE UNION EXPENDS MONIES FOR POLITICAL AND IDEOLOGICAL PURPOSES UNRELATED TO COLLECTIVE BARGAINING?

PARTIES

In addition to the parties named in the caption, Joyce Coulter, Shirley Duckins, Verdis Fields, Barbara Gillmore, Catherine Greebe and Gary Samples were defendants in the Court of Common Pleas and appellants in the Ohio Court of Appeals. The Toledo Board of Education was a defendant in the Court of Common Pleas and an appellee in the Court of Appeals.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 5

STATEMENT OF THE CASE 7

THE FEDERAL QUESTION IS SUBSTANTIAL 9

CONCLUSION 19

APPENDIX

DECISION AND JOURNAL ENTRY OF THE OHIO COURT OF APPEALS 1a

OPINION OF THE OHIO COURT OF APPEALS 2a

Page

OPINION AND JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS FOR LUCAS COUNTY 14a

ORDER OF THE SUPREME COURT OF OHIO DENYING MOTION TO CERTIFY THE RECORD 21a

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES 22a

TABLE OF AUTHORITIES

Cases *Page*

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) ..... *passim*

Ball v. City of Detroit, 84 Mich. App. 383, 269 N.W.2d 607 (1978)..... 11

Beck v. Communications Workers, 106 L.R.R.M. 2323 (1981), *further proceedings*, 112 L.R.R.M. 3069 (D.Md. 1983) 16

Cantwell v. Connecticut, 310 U.S. 296 (1940) 18

Carroll v. President of Princess Anne, 393 U.S. 175 (1968)..... 18

Cort v. Ash, 422 U.S. 66 (1975) 17

Dayton Teachers Association v. Dayton Board of Education, 41 Ohio St.2d 127, 323 N.E. 714 (1975)..... 3

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 5

Elrod v. Burns, 427 U.S. 347 (1976) 17

Ellis v. Railway Clerks, 685 F.2d 1065 (9th Cir. 1982), *rev'd in pertinent part*, ____ U.S. ____, 104 S. Ct. 1883 (1984) 12, 16

Ellis v. Railway Clerks, ____ U.S. ____, 104 S. Ct. 1883 (1984) ..... *passim*

Page

Galda v. Bloustein, 686 F.2d 159 (3d Cir. 1982) 12

Hamilton v. Regents of University of California,
293 U.S. 245 (1934) 5

Hickman v. Taylor, 329 U.S. 495 (1947) 15

Illinois ex rel. McCollum v. Board of Education,
333 U.S. 203 (1948) 5

International Association of Machinists v. Street,
367 U.S. 740 (1961) 13

Japan Line, Ltd. v. County of Los Angeles,
441 U.S. 434 (1979) 3

Jefferson Area Teachers Association v. Lockwood,
69 Ohio St.2d 671, 433 N.E.2d 604, *cert denied*,
____ U.S. ____, 103 S. Ct. 27 (1982) 3, 4, 7

Kempner v. Local 2077, State, County & Municipal Employees, 126 Mich. App. 452, 337 N.W.2d 354 (1983), *appeal docketed*, 53 U.S.L.W.
____ (U.S. September ____, 1984)
(No. 83-_____) 12

King Manufacturing Co. v. City Council of Augusta,
277 U.S. 100 (1928) 5

Lehnert v. Ferris Faculty Association,
556 F. Supp. 316 (W.D. Mich. 1983) 15

Lockwood v. Jefferson Area Teachers Association,
____ U.S. ____, 103 S. Ct. 27 (1982) 4

Page

McDonald v. City of West Branch,
____ U.S. ____, 104 S. Ct. 1799 (1984) 15

Patsy v. Florida Board of Regents,
457 U.S. 496 (1982) 15

Perry Education Association v. Perry Local Educators Association, ____ U.S. ____,
103 S. Ct. 948 (1983) 4

Railway Clerks v. Allen, 373 U.S. 113 (1963) 13, 15, 16

Robbinsdale Education Association v. Robbinsdale Federation of Teachers, Local 872, 307 Minn. 96, 239 N.W.2d 437, *vacated and remanded for further consideration sub nom. Threlkeld v. Robbinsdale Federation of Teachers*, Local 872, 429 U.S. 880 (1976), *reinstated*, 316 N.W.2d 551 (Minn.), *appeal dismissed*, 103 S. Ct. 24 (1982) 11

Robinson v. New Jersey, 547 F. Supp. 1297 (D.N.J. 1982), *further proceedings*, 565 F. Supp. 942 (D.N.J. 1983), *rev'd*, No. 82-5698 (3d Cir. August 6, 1984) 11, 12

San Jose Teachers Association v. Superior Court,
____ Cal. App. 3d ____, 204 Cal. Rptr. 129 (1984) 12

Schneider v. Colegio de Abogados de Puerto Rico,
565 F. Supp. 963 (D.P.R. 1983) 12

Page

School Committee of Greenfield v. Greenfield Education Association, 385 Mass. 70, 431 N.E.2d 180 (1982) 12

Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) 18

Standard Oil Co. v. Johnson, 316 U.S. 481 (1942) 3

University of Connecticut Chapter, AAUP v. Dombrowski, 38 Conn. Sup. 629, 458 A.2d 700 (1983) 12

White Cloud Education Association v. White Cloud Board of Education, 101 Mich. App. 309 (1980), *appeal docketed sub nom. Jibson v. White Cloud Education Association*, 52 U.S.L.W. 3846 (U.S. May 7, 1984) (No. 83-1816) 12

Statutes and Court Rules

United States Code

28 U.S.C. § 1257(2) 3
42 U.S.C. § 1983 8

Ohio Revised Code

§ 3313.17 ..... 3, 4, 5
§ 3313.20 ..... 3, 4, 5
§ 3313.33 ..... 3, 6
§ 3313.47 ..... 3, 4, 6
§ 3319.08 ..... 3, 6
§ 4117.01, *et seq*. 3

Page

Ohio Rules of Practice of the Supreme Court
Rule II, Section 2 ..... 3, 9

Constitutional Provisions

Constitution of the United States
First Amendment ..... *passim*
Fifth Amendment 8
Fourteenth Amendment 1, 2, 5, 8

Other Authorities

Levinson, *After Abood: Public Sector Union Security and the Protection of Individual Public Employee Rights*, 27 Am. U. L. Rev. 1 (1977) 17

No. _____

IN THE

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TOLEDO FEDERATION OF TEACHERS, *et al.*,

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On Appeal From the Court of Appeals of Ohio, Sixth Appellate District

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JURISDICTIONAL STATEMENT

Appellants Ellen Gibney, *et al.*, (hereinafter "teachers") appeal from that part of the final judgment of the Ohio Court of Appeals which holds that Ohio's statutory scheme authorizing agency shops permits a court to enter a judgment against dissenting teachers for a fee equal to full union dues, and requires them to go through appellee Toledo Federation of Teachers' (hereinafter "TFT") internal rebate procedure before they may have a judicial determination of their constitutional challenge to the amount of the fee, is not repugnant to the First Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment.

OPINIONS BELOW

The opinion of the Ohio Court of Appeals, which appears in the Appendix, page 2a, is unreported. The order of the Supreme Court of Ohio, which treats the appeal to that court as a motion to certify the record and denies that motion, is unreported and is set forth in the Appendix, page 21a. The opinion of the Court of Common Pleas for Lucas County granting TFT's motion for summary judgment also is unreported and appears in the Appendix, *infra*, p. 14a.

JURISDICTION

This is an appeal from a judgment entered by the Ohio Court of Appeals affirming a trial court judgment awarding damages to TFT.

In its complaint TFT brought suit against the teachers for an agency-shop fee equal to the dues paid by a member of the organization. In their answer the teachers notified the TFT of their objection to the use of their fees for other than collective bargaining purposes and throughout the proceedings in the state courts drew into question the validity of Ohio law with respect to agency shops on the ground of its repugnance to the First and Fourteenth Amendments to the Constitution of the United States, if said law were interpreted to give the TFT unrestricted use of the fees before the constitutional validity of their amount had been adjudicated. The Ohio Court of Appeals rejected this argument and held that the teachers must pay the contested fee to the TFT and go through its internal rebate procedure as prerequisites to the adjudication of the constitutional questions, implicitly holding the statutory scheme constitutional as

applied.

The judgment sought to be reviewed was entered on February 3, 1984. See Appendix pages 1a and 2a. The Supreme Court of Ohio denied the teachers' timely appeal, treating it as a motion to certify the record pursuant to Rule II, Section 2, of the Ohio Rules of Practice of the Supreme Court by an order entered on June 6, 1984. Appendix, *infra*, p. 21a. A notice of appeal to this Court was filed in the Ohio Court of Appeals on July 26, 1984. Appendix, page 22a.

This Court has jurisdiction of this appeal by virtue of 28 U.S.C. § 1257(2). Because the Ohio Supreme Court treated the appeal as a motion to certify the record and denied the motion, the Court of Appeals is the highest court of Ohio in which a decision could be had. *See Abood v. Detroit Board of Education*, 431 U.S. 209, 216 (1977). Jurisdiction lies under 28 U.S.C. § 1257(2) where a state court rejects a contention that a state statute as applied is repugnant to the Constitution of the United States. *E.g., Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 440-41 (1979); *Standard Oil Co. v. Johnson*, 316 U.S. 481, 482-83 (1942).

At the time of trial Ohio had no statute specifically authorizing or prohibiting agency shops.[1] In the case of *Dayton Teachers Association v. Dayton Board of Education*, 41 Ohio St. 2d 127, 323 N.E.2d 714 (1975), the Supreme Court of Ohio construed the provisions of Ohio Revised Code (O.R.C.) §§ 3313.17, 3313.20, 3313.33, 3313.47, and 3319.08 as authorizing a Board of Education in Ohio to enter into a collective bargaining agreement with a representative of its employees. In *Jefferson Area Teachers Association v.*

[1] Ohio Revised Code § 4117.01, *et seq.*, became effective on April 1, 1984.

Lockwood, 69 Ohio St. 2d 671, 433 N.E.2d 604, *cert. denied*, ____ U.S. ____, 103 S. Ct. 27 (1982), the Supreme Court of Ohio held that O.R.C. §§ 3313.17, 3313.20, and 3313.47 authorize a Board of Education to agree to an agency-shop provision which requires nonmembers of the exclusive representative to contribute financial support to the exclusive representative. In the case *sub judice*, the Ohio Court of Appeals, citing *Lockwood* but no other statutory provision, held that these statutes authorize a judgment for TFT which licenses the use of nonunion members' fees for purposes other than collective bargaining. An identical interpretation of state law was the jurisdictional basis for the appeal in *Abood*. *See* 431 U.S. at 232. The constitutional injury here is identical to that in *Abood* and access to this Court should be equally available by appeal.

This case differs from *Perry Education Association v. Perry Local Educators' Association*, ____ U.S. ____, 103 S. Ct. 948 (1983), and *Lockwood v. Jefferson Area Teachers Association*, ____ U.S. ____, 103 S. Ct. 27 (1982), because the essential operation of the judgment of the Ohio Court of Appeals is to construe the Ohio statutes, previously deemed to authorize collective bargaining and agency shops, so as to permit an exclusive representative of public employees to expend agency-shop fees for political and other ideological purposes. In both *Perry* and *Lockwood* the constitutional attack focused solely on the collective bargaining agreement, not the underlying statutes. For example, the claim in *Lockwood* was that in the *absence* of specific statutory authorization, the U.S. Constitution prohibits all agency-shop agreements. By contrast, the claim here is that the *statutory* authorization of agency-shop fees for political and ideological purposes is unconstitutional. Indeed, the agency-shop agreement here came into being only after it was authorized by Ohio law. *See* Resolution of the School

Board, *infra*, at 6. Therefore, *Abood* is the controlling precedent in this case. *See Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 206 (1948); *Hamilton v. Regents of University of California*, 293 U.S. 245, 257-58 (1934); *and see Doran v. Salem Inn, Inc.*, 422 U.S. 922, 927 n.2 (1975); *King Manufacturing Co. v. City Council of Augusta*, 277 U.S. 100, 104 (1928).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law. . .abridging the freedom of speech, . . .or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> . . .nor shall any State deprive any person of life, liberty, or property, without due process of law. . .

The O.R.C. sections involved provide in pertinent part:

> § 3313.17. The board of education of each school district shall be a body politic and corporate, and, as such, capable of suing and being sued, contracting and being contracted with, ...
>
> § 3313.20. The board of education shall make such rules and regulations as are necessary for its

> government and the government of its employees....
>
> § 3313.33. . . .No contract shall be binding on any board unless it is made or authorized at a regular or special meeting of such board. . . .
>
> § 3313.47. Each city, exempted village, or local board of education shall have the management and control of all of the public schools of whatever name or character in its respective district. If the board has adopted an annual appropriation resolution, it may, by general resolution, authorize the superintendent or other officer to appoint janitors, superintendents of buildings, and such other employees as are provided for in such annual appropriation resolution.
>
> § 3319.08. The board of education of each city, exempted village, local, and joint vocational school district shall enter into written contracts for the employment and re-employment of all teachers.

The agency-shop agreement between the school board and TFT came into being as a result of the following resolution:

> WHEREAS, the Board has agreed to authorize agency shop when permissible in law; and,
>
> WHEREAS, on March 9, 1982 the Ohio Supreme Court ruled that an agency shop "is permissible in law"; and,
>
> WHEREAS, the Board's negotiator has tentatively agreed to these provisions, subject to recommendation by the Superintendent and adoption by the Board; and,

> WHEREAS, it is the recommendation of the Superintendent of schools to adopt this agreement; NOW THEREFORE,
>
> BE IT RESOLVED, that the Toledo Board of Education hereby agrees to amend the collective bargaining agreement with the Toledo Federation of Teachers as follows:
>
> Eliminate Article I C5 from Master Agreement and substitute the following Article I D:
>
> [Here followed the text of the agency-shop agreement.]

The March 9, 1982, ruling of the Ohio Supreme Court referred to in the resolution is *Jefferson Area Teachers Association v. Lockwood, supra.*

STATEMENT OF THE CASE

Effective August 1, 1982, the Toledo Board of Education (Board) and TFT entered into a collective bargaining agreement which required each teacher in the unit of employees represented by TFT either to be a member of TFT or to pay it a "service fee not to exceed the amount of dues uniformly required of members." The agreement required TFT to notify nonmembers of their obligation and the right to, and procedure for, a refund of the amount spent for "causes of a political nature or involving controversial issues of public importance only incidentally related to wages, hours and conditions of employment."

The teachers notified the Board not to deduct service fees from their salaries, and refused to make any voluntary

payments to TFT.

TFT brought suit against the teachers in the Court of Common Pleas for a service fee equal to the dues paid by a member of TFT. The teachers denied that they were indebted to TFT. Their answer raised affirmative defenses including their objection to the use of their fees for political and ideological purposes, and set forth a counterclaim based on 42 U.S.C. § 1983. After a limited amount of discovery, TFT filed a motion for summary judgment and a motion for a protective order against further discovery pending the decision on the motion for summary judgment.

In their opposition to these motions in the Court of Common Pleas the teachers asserted the First Amendment nature of their objections and argued that requiring them first to pay the full fee and then to go through TFT's internal rebate procedure would violate the Due Process Clause and other rights guaranteed to them by the First, Fifth, and Fourteenth Amendments to the Constitution.

On April 25, 1983, the court granted TFT's motion for a protective order. On August 15, 1983, without permitting the teachers any further discovery, the court granted TFT's motion for summary judgment. Appendix pages 14a-20a. The teachers filed a motion for reconsideration on or about September 5, 1983, and filed a timely appeal to the Court of Appeals on September 12, 1983. On September 20, 1983, the motion for reconsideration was denied by the Court of Common Pleas.

In the Court of Appeals the teachers repeated the same constitutional arguments they had made below. Specifically, they argued that the result reached by the trial court

was unconstitutional under *Abood*. On February 3, 1984, the Court of Appeals issued its opinion affirming the judgment of the Court of Common Pleas. Appendix pages 2a-13a. On March 5, 1984, the teachers filed in the Court of Appeals a timely Notice of Appeal to the Ohio Supreme Court. Pursuant to the Ohio Rules of Practice of the Supreme Court, Rule II, Section 2, the Ohio Surpreme Court treated the appeal as a motion to certify the record and denied the motion by an order dated June 6, 1984. Appendix page 21a. On July 26, 1984 a notice of appeal to this Court was filed with the Clerk of the Ohio Court of Appeals, the court from whose judgment this appeal is taken. Appendix pages 22a-23a. This jurisdictional statement is filed with the Court within ninety days of June 6, 1984.

THE FEDERAL QUESTION IS SUBSTANTIAL

The first question this appeal presents is one that this Court answered for the first time on April 25, 1984 in *Ellis v. Railway Clerks*, ____ U.S. ____, 104 S. Ct. 1883 (1984). *Ellis* establishes that the ruling of the Ohio Court of Appeals on this question is erroneous. The second question is related to the first and has not been answered by this Court in the context of public employment. However, *Ellis* answered the question in the negative in the context of private employment. If internal rebate procedures are unlawful in the private sector, *a fortiori*, they are unlawful in the public sector.

Abood addressed the constitutionality on its face of a public-sector agency-shop statute that authorized an agreement similar to that involved here. The Court held that an agency-shop agreement "[t]o compel employees financially

to support their collective-bargaining representative has an impact upon their First-Amendment interests," but is constitutional "insofar as the service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes." *Id.* at 222 and 232.

However, the Court also concluded that, if the agency-shop fee is not so limited and an objecting employee's compulsory monies are used "for political and ideological purposes unrelated to collective bargaining," the arrangement violates the First Amendment. *Id.* at 232-37. Because the *Abood* appeal arose from a judgment on the pleadings, the Court addressed the issue of the appropriate remedy only in *dicta*, leaving this important question for resolution in subsequent litigation. *Id.* at 236-42. Justice Stevens emphasized that this disposition of *Abood* reserved the very question presented on this appeal:

> By joining the opinion of the Court, including its discussion of possible remedies, I do not imply — nor do I understand the Court to imply — that the remedies described in *Machinists v. Street*, 367 U.S. 740 [(1961)], and *Railway Clerks v. Allen*, 373 U.S. 113 [(1963)], would necessarily be adequate in this case or in any other case. More specifically, the Court's opinion does not foreclose the argument that the Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining.

Id. at 244 (Stevens, J., concurring).

The issue anticipated by Justice Stevens — whether the First Amendment permits agency-shop arrangements which do not avoid the temporary use of objecting employees' fees for political and ideological purposes — then arose in several lower courts. The results were conflicting.

The first lower court to confront the post-*Abood* question of the constitutionality of coerced political and ideological "loans" was the Michigan Court of Appeals.[2] In *Ball v. City of Detroit*, 84 Mich. App. 383, 397, 269 N.W.2d 607, 613 (1978), the court said:

> [W]e agree with plaintiffs that allowing the union the use of funds prior to a judicial determination subjects nonmembers to the risk that their fees may be used, even temporarily, for activities to which they are opposed. Because fundamental First Amendment rights are at stake, we believe the proper solution is to require nonmembers to pay service fees into an escrow account. While we recognize this works somewhat of a hardship on the union because temporarily it will be unable to collect even the portion of service fees to which it is entitled, that hardship is outweighed by the possibility that First Amendment rights will be violated.

Ball was followed by courts in other jurisdictions. *Robinson v. New Jersey*, 547 F. Supp. 1297, 1321-22 (D.N.J. 1982)

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[2] In a pre-*Abood* decision, the Minnesota Supreme Court had held that procedural due process entitles an objecting employee to an injunction against the use of "fair share" fees until the validity of their amount is adjudicated. *Robbinsdale Educ. Ass'n v. Robbinsdale Fed'n of Teachers Local 872*, 307 Minn. 96, 100-09, 239 N.W.2d 437, 440-45, *vacated & remanded for further consideration sub nom. Threlkeld v. Robbinsdale Fed'n of Teachers, Local 872*, 429 U.S. 880 (1976), *reinstated*, 316 N.W.2d 551 (Minn.), *appeal dismissed*, 103 S. Ct. 24 (1982).

(granting preliminary injunction), *further proceedings*, 565 F. Supp. 942, 948-49 (D.N.J. 1983), *rev'd*, No. 82-5698 (3d Cir. August 6, 1984);[3] *School Committee of Greenfield v. Greenfield Education Association*, 385 Mass. 70, 83-85, 431 N.E.2d 180, 189 (1982); *see Galda v. Bloustein*, 686 F.2d 159, 167-69 (3d Cir. 1982); *Schneider v. Colegio de Abogados de Puerto Rico*, 565 F. Supp. 963, 976-77 (D.P.R. 1983). In suits to collect fees other courts have required the union to prove its collective bargaining costs. *San Jose Teachers Association v. Superior Court*, ____ Cal. App.3d ____, 204 Cal. Rptr. 129 (1984); *University of Connecticut Chapter, AAUP v. Dombrowski*, 38 Conn. Sup. 629, 458 A.2d 700 (1983).

However, some lower courts saw no constitutional defect in permitting unions to use union- or agency-shop provisions as a means of obtaining forced loans to subsidize their political and ideological activities unrelated to collective bargaining. Cases holding that a post-spending refund is an adequate remedy included the decision of the Court of Appeals in this action and *White Cloud Education Association v. White Cloud Board of Education*, 101 Mich. App. 309, 300 N.W.2d 551 (1980), *appeal docketed sub nom. Jibson v. White Cloud Education Association*, 52 U.S.L.W. 3846 (U.S. May 7, 1984) (No. 83-1816); *Kempner v. Local 2077, State, County, Municipal Employees*, 126 Mich. App. 452, 459-61, 337 N.W.2d 354, 357-58 (1983), *appeal docketed*, 53 U.S.L.W. ____ (U.S. September ____, 1984) (No. 83- ____), and, most significantly, *Ellis v. Railway Clerks*, 685 F.2d 1065, 1069-70 (9th Cir. 1982), *rev'd in pertinent*

[3] The Third Circuit's reversal was by a 2-1 decision and is clearly erroneous under *Ellis*. The District Court's decision in *Robinson* was one of the lower court precedents with which this Court agreed in holding that a rebate "scheme does not adequately protect the rights of dissenting employees." *Ellis*, 104 S. Ct. at 1890 n.7.

part, ____ U.S. ____, 104 S. Ct. 1883 (1984).

In short, *Abood* and these conflicting lower-court decisions show that this case presents a substantial federal constitutional question which this Court had not resolved prior to *Ellis*. In the Ohio courts the teachers argued, citing the traditional First-Amendment principles applied in *Abood*, 431 U.S. at 233-36, that the only valid agency-shop arrangement is one which prevents even *temporary* use of coerced monies for impermissible purposes and that they could not be required to resort to TFT's internal rebate procedure as a prerequisite to obtaining a judicial decision on their constitutional claims. *Ellis* establishes unequivocally they were correct.

In discussing the issue of the validity of a rebate scheme, *Ellis* first states that the opinions in *Abood, International Association of Machinists v. Street*, 367 U.S. 740 (1961), and *Railway Clerks v. Allen*,373 U.S. 113 (1963), "did not, nor did they purport to, pass upon the statutory *or constitutional* adequacy of the suggested remedies. Doing so now, we hold that the pure rebate approach is inadequate." *Ellis*, 104 S.Ct. at 1889-90 (emphasis added) (footnote omitted). The Court then explains its reasoning for this holding:

> By exacting and using full dues, then refunding months later the portion that it was not allowed to exact in the first place, the union effectively charges the employees for activities that are outside the scope of the statutory authorization. The cost to the employee is, of course, much less than if the money was never returned, but this is a difference of degree only. The harm would be reduced were the union to pay interest on the amount refunded, but respondents did not do so. Even

> then the union obtains an involuntary loan for purposes to which the employee objects.
>
> The only justification for this union borrowing would be administrative convenience. But there are readily available alternatives, such as advance reduction of dues and/or interest-bearing escrow accounts, that place only the slightest additional burden, if any, on the union. *Given the existence of acceptable alternatives, the union cannot be allowed to commit dissenters' funds to improper uses even temporarily. A rebate scheme reduces but does not eliminate the statutory violation.*

Id. at 1890 (emphasis added).

This case cannot be distinguished from *Ellis* and *Abood*. The judgment below permits the union to use dissenters' fees for political and ideological purposes and requires them to utilize the union's internal remedy as a prerequisite to judicial relief. *Abood* prohibits the first result and *Ellis* prohibits the second. This case differs from *Ellis* only in the sense that the rights being violated here are wholly constitutional in nature, not statutory, because the courts below now have authoritatively construed Ohio law to permit the use of service fees for any purpose including political activities. *See, Abood*, 431 U.S. at 232. As the Court said in *Abood*, 431 U.S. at 240, "that difference surely could not justify any lesser relief in this case."

The Ohio Court of Appeals recognized that this Court in *Abood* held that the use of service fees for political activities was a constitutional violation but determined that the amount spent for such purposes was not a material issue of fact in a suit to collect the fees because of the union's

self-administered refund procedure.

The Court of Appeals believed that "[s]uch refund procedures were implicitly approved by the United States Supreme Court in *Abood*," and that it was proper to require exhaustion of the contract remedy before giving judicial relief for the constitutional violation. *Ellis* makes it clear that the Ohio Court's interpretation of this Court's precedents was erroneous. A refund does not remedy the constitutional violation; and *McDonald v. City of West Branch*, ____ U.S. ____, 104 S.Ct. 1799 (1984), makes it clear that contractual remedies are not an adequate substitute for the judicial determination of constitutional rights. *See also Patsy v. Florida Board of Regents*, 457 U.S. 496, 503 (1982).

The primary issues in litigation in which a dissenting employee has raised a First-Amendment objection to the amount of an agency-shop fee are identification of the nature and amount of each of the union's expenditures; determination of which union activities are related to collective bargaining, contract administration and grievance adjustment; and calculation of the amount of a constitutionally permissible fee. These are complex and "difficult" factual issues which this Court twice has ruled should not be determined in the absence of a concrete and comprehensive evidentiary record. *Abood*, 431 U.S. at 236-37; *Allen*, 373 U.S. at 120-21. They are also issues which require an "adversary presentation." *Abood*, 431 U.S. at 236.

Factual concreteness and a fair adversary proceeding cannot reasonably occur unless the employee is allowed discovery of the union's financial records. *Lehnert v. Ferris Faculty Association*, 556 F. Supp. 316 (W.D. Mich. 1983); *see Hickman v. Taylor*, 329 U.S. 495, 507 (1947). The burden of proving what proportion of fees is spent for

permissible purposes is on the union. *Ellis*, 104 S.Ct. at 1897 n.15, *citing Allen*, 373 U.S. at 122. But the employee cannot attempt to rebut the union's evidence and cross-examine, and perhaps even impeach, its witnesses unless he previously has had access to the potential evidence.

In this case, the potential evidence, the books and records of TFT and its state and national affiliates,[4] is in the possession and control of the TFT, not the teachers. Common sense and the reported history of other agency-shop cases leave no doubt that discovery and trial of the facts concerning the activities and expenditures of the union and its affiliates is a major undertaking requiring many months, at least, to complete. *See, e.g., Ellis*, 685 F.2d at 1067-68, 1071, *aff'g in part* 88 Lab. Cas. ¶ 11,986 (S.D. Cal. 1980) (filed 1973, interlocutory summary judgment entered 1976, tried 1978, final trial court decision 1980; "extensive discovery for five years"; at trial union produced "voluminous financial records" and detailed testimony of numerous witnesses); *Beck v. Communications Workers*, 106 L.R.R.M. 2323, 2324 (1981) (27-day hearing before Special Master), *further proceedings*, 112 L.R.R.M. 3069, 3072 (D. Md. 1983) (over 800 additional pages of transcript and more than 3,000 exhibits on re-reference).

Thus, the Court of Appeals' decision gives the teachers no option which will adequately protect their First-Amendment right not to subsidize TFT's political and ideological activities unrelated to collective bargaining. They must pay the judgment for the entire fee; and TFT will have the unfettered use of their fees over a long period of time, subjecting them to the certainty that in the interim their funds will be spent on political and ideological activities unrelated to collective

[4] The TFT is a local affiliate of the American Federation of Teachers. Answer at paragraph 15, filed November 8, 1982.

bargaining.

This result is prohibited by the Constitution. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). The irreparable injury in agency-shop cases is clear:

> [T]he stark reality is that the subsequent rebate of compulsory funds misspent on activities having significant first amendment sensitivity cannot undo the infringement of constitutional rights that the expenditure caused in the first instance. Once political or ideological viewpoints have been expressed or political influence applied, they cannot be withdrawn "from the marketplace of ideas, the legislative chamber, or the polling booth."

Levinson, *After Abood: Public Sector Union Security and the Protection of Individual Public Employee Rights*, 27 Am. U. L. Rev. 1, 28-29 (1977) (footnote omitted); *see Ellis*, 104 S.Ct. at 1890; *Cort v. Ash*, 422 U.S. 66, 84 (1975).

The decisions of this Court "have prohibited conditions on public benefits, in the form of jobs or otherwise, which dampen the exercise generally of First Amendment rights, however slight the inducement to the individual to forsake those rights." *Elrod*, 427 U.S. at 358 n.11; *see Abood*, 431 U.S. at 234 n.31. Because it allows unions to spend coerced fees before the constitutionality of the spending has been adjudicated, the procedural scheme of the Ohio agency-shop statutes, as applied by the Court of Appeals, works an incurable prior restraint upon dissenters' freedom not to speak for or associate with political and ideological causes they oppose.

As the Court held in *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940),

> The availability of a judicial remedy for abuses in the system * * * still leaves that system one of previous restraint which, in the field of free speech * * *, we have held inadmissible. A statute authorizing previous restraint upon the exercise of the guaranteed freedom by judicial decision after trial is as obnoxious to the Constitution as one providing for like restraint by administrative action.

The inherent vice of any agency-shop scheme which relegates employees to a post-spending remedy is its cession to unions of the power irreparably to compromise fundamental employee freedoms in advance — and thus in a manner subversive — of meaningful judicial review.

The reasons for insisting upon strict procedural standards are particularly compelling in cases involving political speech and association. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 162-63 (1969) (Harlan, J., concurring); *Carroll v. President of Princess Anne*, 393 U.S. 175, 182 (1968). *Ellis* holds that there are alternative agency-shop procedural systems, such as interim escrow, which are less restrictive of fundamental First-Amendment rights than the scheme adopted by the Ohio Court of Appeals in this case. The authorizing statutes therefore are unconstitutional as applied.

Should the Court determine that an appeal does not lie, it should consider the appeal as a petition for certiorari and grant the petition. The questions presented are important ones involving fundamental rights protected by the First Amendment. The Court of Appeals' decision was rendered

before this Court's decision in *Ellis* and its analysis and application of this Court's precedents reach the same erroneous result reversed in *Ellis*. The result below is also contrary to the Court's holding in *Abood*. The conflict in the decisions of the courts of different States as shown by the cited decisions from California and Connecticut on the one hand and Ohio and Michigan on the other indicates a need for additional guidance from this Court on the proper treatment of the fundamental federal rights involved. Regardless of the source of this Court's power to review the matter, the combination of *Ellis* and *Abood* demonstrates the failure of the Ohio Court of Appeals to protect the important First-Amendment rights of these teachers. Only this Court can now protect them from the constitutional injury which is sure to result unless the decision below is reversed.

CONCLUSION

For the foregoing reasons, the Court should summarily reverse the decision below and declare the Ohio agency-shop statutes unconstitutional as applied. Further, the court should remand the case with directions which require TFT to prove the amount of its entitlement before any judgment is awarded and which permit the teachers to conduct discovery and litigate the issues raised by their defenses and counterclaim. In the alternative, the Court should note probable jurisdiction of the appeal and set it

down for plenary briefing and argument.

Respectfully submitted,

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September 4, 1984

APPENDIX

IN THE COURT OF APPEALS OF LUCAS COUNTY

Toledo Federation of Teachers
Appellee,

v.

Ellen Gibney, *et al.*
Appellants.

DATE: February 3, 1984

COURT OF APPEALS
NO. L-83-303

TRIAL COURT
NO. CV 82-2665

DECISION AND JOURNAL ENTRY

Finding the sole assignment of error not well taken, judgment of the Lucas County Common Pleas Court is affirmed at appellants' costs and cause is remanded to said court for execution of judgment and assessment of costs. See Opinion by Douglas, J., on file.

(Filed February 3, 1984)

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See also Supp. R. 4, amended 1/1/80.

Andy Douglas, J.

JUDGE

Peter M. Handwork, J.

JUDGE

Alice Robie Resnick, J.

CONCUR.

JUDGE

IN THE COURT OF APPEALS OF LUCAS COUNTY

Toledo Federation of Teachers
Plaintiff-Appellee,

v.

Ellen Gibney, *et al.*
Defendants-Appellants.

C.A. No. L-83-303

C.P. No. CV 82-2665

OPINION
Decided: February 3, 1984

(Filed February 3, 1984)

1. Where a labor organization is the exclusive representative of the employees or a class of the employees of an employer, the labor organization may properly assess and collect a service fee from non-member employees, represented thereby, in accordance with the terms of its collective bargaining agreement. Jefferson Area Teachers Assn. v. Lockwood (1982), 69 Ohio St. 2d 671, followed.

2. The use of such service fees for the promotion of political activities, over objection, is, however, violative of the non-member's first amendment rights. Abood v. Detroit Board of Education (1977), 431 U.S. 209, followed.

3. Where a refund procedure by which a non-member may protest the use of any portion of his service fee for political activities is provided, such procedural remedy must be exhausted prior to the assertion of any claim regarding such expenditures in a judicial proceeding.

* * * * *

Messrs. R. Timothy Bauer and David T. Bryant, Counsel for Appellants.

Messrs. David M. Schnorf and Frank T. Pizza, Counsel for Appellees.

* * * * *

DOUGLAS, J. This case comes before this court on appeal from judgment of the Lucas County Court of Common Pleas.

Effective August 1, 1982, the Toledo Board of Education (hereinafter referred to as the Board) and appellee, the Toledo Federation of Teachers, entered into a collective bargaining agreement which provided, in pertinent part, as follows:

> *"D. Agency Shop, Payroll Deduction Dues Check-Off*
>
> "1. In recognition of the Federation's service to the bargaining unit, all members of the bargaining unit shall within thirty (30) days of the effective date of this agreement, or the signing of this agreement, or their date of hire, whichever is later, either be members of the Federation or share in the financial support of the Federation by paying to the Federation a service fee not to exceed the amount of dues uniformly required of members of the Federation.
>
> "2. The effective date of this amended Section D shall be August 1, 1982.
>
> "3. The Federation shall notify non-members of their obligation to pay service fees and such notification will include the procedures for payroll

deduction and direct cash payments, and shall include a notice of the right of and procedure for non-members to recover the portion of the annual fee which is expended for activities or causes of a political nature or involving controversial issues of public importance only incidentally related to wages, hours and conditions of employment.

"4. Subject to the right of any teacher to revoke such deduction by written notice to the Board and to the Federation prior to the close of school in any school year, or the date in Paragraph 1, whichever is later, the Federation as a collective bargaining representative of each teacher authorizes the Board to deduct from wages of each teacher dues or service fees in ten (10) equal monthly amounts beginning with the first pay period of September through June. This payroll authorization for non-members' service fees shall conform to the scheduled deductions of members' dues. Cash payments of service fees shall conform with Federation constitutional provisions covering cash payments of dues for members. In 1982 non-members may by written notice to the Board and to the Federation prior to September 10, 1982 revoke such deduction. Service fees with (sic) then be required.

"5. Payroll deduction of dues or service fees for the bargaining agent shall be renewed automatically subject to Paragraph 4 above. Enrollment shall be on a monthly basis. Deductions shall be made monthiy except for hourly and per diem employees. These employees will have dues deducted each pay period.

"6. Cancellation of Federation membership and service fee deductions shall conform to past practice — i.e. notice of cancellation must be given to the Federation prior to the close of the school year to be effective at the beginning of the next school year. Service fees will then be required.

"7. The Federation shall inform all present teachers and the Board shall inform all teachers hired after August 1, 1982 and all teachers returning from leaves of absence thereafter, that they are obligated to join the Federation or pay the service fee as provided in Paragraph 1 above. The Federation shall use mutually agreed upon letters of notice signed by an authorized Federation representative for this purpose.

"8. The Board shall provide each pay period when deductions are taken to the Federation, a list of those members and non-members on payroll deduction.

"9. The Board shall provide each month to the Federation a list of new teachers, teachers returning from leaves of absence, and teachers granted leaves of absence."

In accordance with paragraph D. 4, appellants, certain non-member teachers, notified the Board of their revocation of the service fee payroll deduction. Appellants further refused to make a cash payment of the service fee.

Appellee, therefore, instituted this cause of action in the Lucas County Court of Common Pleas against appellants, seeking to recover service fees allegedly owed pursuant to

the terms of the collective bargaining agreement. In due course, appellants answered, denying any legal obligation to pay the service fee and setting forth a counterclaim based upon 42 U.S.C. Section 1983.

Appellants, thereafter, initiated discovery by filing a set of interrogatories. Appellee, subsequently, filed its answers to appellants' first set of interrogatories. Appellants then filed a motion to compel further answers to the interrogatories and appellee filed motions for summary judgment and for protective order pending determination of its motion for summary judgment.

The trial court granted appellee's motion for protective order and, subsequently, entered judgment in favor of appellee, granting appellee's motion for summary judgment and dismissing appellants' counterclaim.

From that judgment, appellants appeal, presenting the following assignment of error:

"THE TRIAL COURT ERRED IN:

A. GRANTING SUMMARY JUDGMENT FOR THE PLAINTIFF AND REQUIRING DEFENDANTS TO UTILIZE PLAINTIFF'S REBATE PROCEDURE;

B. GRANTING PLAINTIFF'S MOTION FOR A PROTECTIVE ORDER;

C. DISMISSING DEFENDANTS' COUNTER-CLAIM."

At the outset, we note two procedural problems with

appellants' appeal. First, we question appellants' standing to raise any issue regarding appellee's expenditures for the reason that appellants, not having paid any amount to appellee as and for service fees, can have, at present, no interest therein. See Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes v. Allen (1963), 373 U.S. 113, at paragraph number 2. (b) of the syllabus. Second, we note that appellants failed to file any affidavits or other evidentiary material in support of their memorandum in opposition to appellee's motion for summary judgment, permitting the entering of summary judgment against them if otherwise appropriate. See Benjamin v. Deffet Rentals (1981), 66 Ohio St. 2d 86; Gates Mills Investment Co. v. Pepper Pike (1978), 59 Ohio App. 2d 155; Reynoldsburg Motor Sales v. Columbus (1972), 32 Ohio App. 2d 271. Although appellants are, in essence, seeking an advisory opinion, we shall, nonetheless, proceed to consider the merits of this appeal because of the importance of the issues presented.

Appellants contend that the trial court erred in granting appellee's motion for summary judgment for the reason that the judgment was violative of their constitutional rights, pursuant to the First and Fourteenth Amendments, in that it permits appellee to use the service fees for any purpose.

In Jefferson Area Teachers Assn. v. Lockwood (1982), 69 Ohio St. 2d 671, the Ohio Supreme Court upheld the validity of service fees, holding, in the syllabus, as follows:

> "A teachers association, which has negotiated a collective bargaining agreement for all teachers employed by a local board of education, may assess and collect from a teacher who is not a member of the association a service fee fixed by

the agreement."

Appellants argue, however, that the service fee in this case was unconstitutional in light of the decision of the United States Supreme Court in Abood v. Detroit Board of Education (1977), 431 U.S. 209, for the reason that the service fee charged by appellee was equal to the dues paid by members of appellee and, therefore, included some proportion expended upon political activities.

The United States Supreme Court considered the validity of service fees in Abood, supra, Brotherhood of Railway and Steamship Clerks, supra, and International Association of Machinists v. Street (1961), 367 U.S. 740, holding, in the syllabus of Abood, as follows:

> "1. Insofar as the service charges are used to finance expenditures by the Union for collective-bargaining, contract-administration, and grievance-adjustment purposes, the agency-shop clause is valid. Railway Employes' Dept. v. Hanson, 351 U.S. 225; Machinists v. Street, 367 U.S. 740.
>
> (a) That government employment is involved, rather than private employment, does not mean that Hanson, supra, and Street, supra, can be distinguished by relying in this case upon the doctrine that public employment cannot be conditioned upon the surrender of First Amendment rights, for the railroad employees' claim in Hanson that a union-shop agreement was invalid failed not because there was no governmental action but because there was no First Amendment violation.
>
> (b). Although public employee unions' activities

are political to the extent they attempt to influence governmental policymaking, the differences in the nature of collective bargaining between the public and private sectors do not mean that a public employee has a weightier First Amendment interest than a private employee in not being compelled to contribute to the costs of exclusive union representation. A public employee who believes that a union representing him is urging a course that is unwise as a matter of public policy is not barred from expressing his viewpoint, but, besides voting in accordance with his convictions, every public employee is largely free to express his views, in public or private, orally or in writing, and, with some exceptions not pertinent here, is free to participate in the full range of political and ideological activities open to other citizens.

2. The principles that under the First Amendment an individual should be free to believe as he will and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State, prohibit appellees from requiring any of the appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher.

(a) That appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights.

(b) The Constitution requires that a union's expenditures for ideological causes not germane to its duties as a collective-bargaining representa-

> tive be financed from charges, dues, or assessments paid by employees who do not object to advancing such causes and who are not coerced into doing so against their will by the threat of loss of governmental employment. * * *"

Thus, the validity of service fees has been upheld by the United States Supreme Court but the use of such service fees for political activities has been held violative of constitutional rights.

Appellants contend, however, that a service fee and an amount equal to union dues must be unconstitutional per se in light of the Abood decision and that the trial court, therefore, erred in granting summary judgment in favor of appellee in that a material issue of fact remained, to wit: what proportion, if any, of the service fees charged was expended for political activities.

We do not agree. Our review of the record reveals that the collective bargaining agreement provided a refund procedure by which non-members could recover any proportionate amount of their service fee expended for political activities. Such refund procedures were implicitly approved by the United States Supreme Court in Abood, supra, wherein the court held, in the syllabus, that:

> "* * * In view, however, of the fact that since the commencement of this litigation appellee Union has adopted an internal Union remedy for dissenters, it may be appropriate to defer further judicial proceedings pending the voluntary utilization by the parties of that internal remedy as a possible means of settling the dispute."

Thus, in granting summary judgment in favor of appellee, the trial court simply required appellants to pursue their contractual remedies first. Appellants further contend, however, that the refund procedure, itself, improperly infringes upon their First Amendment rights in that the procedure is too burdensome and time consuming. Upon consideration of the refund procedure, we find appellants' contentions not well taken for the reason that the procedure provides appellants with an opportunity to lodge their objections, obtain a hearing thereon, appeal any determination made, and, ultimately, have an independent review thereof. Contrasting this procedure with other administrative procedures and tax protest procedures, we find that appellants' refund procedure is not patently unreasonable and constitutes a proper implementation of the rights and obligations of the parties pursuant to the terms of the collective bargaining agreement. See Abood, supra, n. 41.

Appellants further raise an issue regarding the burden of proof in such cases. Having determined that the trial court properly granted summary judgment in favor of appellee on the ground that appellants had failed to pursue their internal remedies, a determination of this issue is not necessary to our decision herein. In the interest of clarity, however, we shall proceed to address this issue.

Typically, the burden of proving a claim falls upon the party asserting the claim. Thus, in this case, appellee would have had the burden of showing an indebtedness and nonpayment thereof. Appellants, having counterclaimed for that proportion of the service fee expended for political purposes, would have had the burden of showing such expenditures and the proportion thereof.

However, in Brotherhood of Railway and Steamship

Clerks, supra, the United States Supreme Court held, at 122, that:

> "Since the unions (defendants) possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion."

While we question the foregoing reasoning when considered with regard to traditional standards of burden of proof and the availability of discovery, we find the reasoning inapplicable to this case in any event by reason of the existence of a rebate procedure during which both parties would have had the opportunity to develop evidentiary materials. We, therefore, find appellants' arguments regarding the issue of burden of proof not well taken.

Finally, appellants contend that the trial court erred in granting appellee's motion for protective order pending determination of its motion for summary judgment and in dismissing appellants' counterclaim.

Upon consideration of the record, we concur in the trial court's determination that extensive financial discovery should be held in abeyance pending a determination of the motion for summary judgment for the reason that a disposition thereof in favor of appellee would render such discovery unnecessary. We, therefore, find appellants' contentions regarding the granting of the motion for protective order not well taken. Having previously determined that the trial court properly granted appellee's motion for summary judgment, requiring appellants to pursue the refund procedure, we further find appellants' contention that the trial

court erred in dismissing their counterclaim not well taken.

For the foregoing reasons, we find appellants' assignment of error not well taken.

On consideration whereof, the court finds that substantial justice has been done the parties complaining and judgment of the Lucas County Court of Common Pleas is affirmed.

This cause is remanded to said court for execution of judgment and assessment of costs. Costs to appellants.

JUDGMENT AFFIRMED.

HANDWORK and RESNICK, JJ., concur.

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

Toledo Federation of Teachers,
Plaintiff,

vs.

Ellen Gibney, *et al.*,
Defendants.

Case No. 82-2665

OPINION AND JUDGMENT ENTRY

(Filed August 15, 1983)

This cause is before the Court on a motion for summary judgment filed March 15, 1983 by Plaintiff Toledo Federation of Teachers. On due consideration of all record evidence and arguments of counsel in a light most favorable to the Defendants, the Court finds no genuine issue of material fact.

By amended complaint filed January 21, 1983, the Plaintiff Toledo Federation of Teachers (hereinafter TFT) seeks monies due and owing from the several Defendants for service fees payable via an agency-shop agreement with Defendant Toledo Board of Education. All Defendants[1] are teachers employed by the Toledo Board of Education and are not members of the Toledo Federation of Teachers. The agency-shop agreement took effect August 1, 1982 and provides for a service fee equal to the amount of dues payable by members of the Plaintiff union. Evidence establishes that notice of said agreement was received by each of the Defendants. All of the several Defendants then opted for a

[1] Hereinafter the "several Defendants" are to include, Ellen Gibney, Joyce Coulter, Shirley Duckins, Barbara Gillmore, Catherine Greebe, Gary Samples and Verdis Fields.

tri-partite cash payment provision whereby the total service fee of $192.00 was payable in $64.00 increments. The first payment was to be submitted on September 30, 1982.

The agency-shop agreement provided for an objection process for non-members who wished to contest the amount and nature of the service fee expenditures. (Sec. 1-3, Agency-Shop Agreement). The Defendants have refused payment of the entire service fee without resort to the objection procedure. Note that none of the several Defendants have paid any service fees to the TFT upon the agency-shop agreement.

As there are no genuine issues of material fact, the Court finds Plaintiff TFT entitled to judgment as a matter of law. Initially, the Board of Education did execute a valid agreement with Plaintiff TFT.

In *Jefferson Area Teachers Association v. Lockwood*, 69 Ohio St. 2d 671 (1982), the Supreme Court of Ohio dealt with the issue of whether Ohio law permits a collection of such service fee. In *Jefferson*, the argument raised by appellant/non-member was that service fees are improper as a school board lacks the statutory authority to agree to such provisions. *Id.*, at 672. Mr. Justice Locher found agency shop provisions proper where "uniformly applicable" and a reasonable managerial decision. *Id.* at 674, See also, *Rehors v. Case Western Reserve*, 43 Ohio St. 2d 224 (1975); *Dayton Teachers Assoc. v. Dayton Board of Education*, 41 Ohio St. 2d 127 (1975); R.C. 3313.20. The evidence provided by the depositions of the several Defendants clearly establishes TFT as the exclusive representative of the majority of Toledo Area Teachers.[2] Therefore, the agency-

[2] It is important to note that the *Jefferson* decision passed on the constitutional issues raised by appellant deferring to the decision of the U.S. Supreme Court in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). *Id.* at 672. (Footnote)

shop agreement is lawful and binding absent a showing of unreasonable managerial discretion by Defendant Toledo Board of Education. In the cause *sub judice* there is not a scintilla of evidence to question the propriety of the establishment of the agency-shop agreement by TFT and the Toledo Board of Education.

Secondly, it is apparent from a close reading of the numerous cases with regard to agency-shop agreements that non-members are entitled to contest the *use* of such fees and not the mere *receipt* of the money by a qualified union representative.

The U.S. Supreme Court initially held that "unions may not *use* union dues or agency fees to finance political activities if members or fee payors object to the use of those funds for such purposes. *International Association of Machinists v. Street*, 367 U.S. 740 (1961); See, *Brotherhood of Railway Clerks v. Allen*, 373 U.S. 113 (1963).

However, Mr. Justice Stewart writing for the majority in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), validated a Michigan statute authorizing payment, to a local union representative, of a service fee equal in amount to union dues although the payors were not union members. Mr. Justice Stewart added that an agency-shop clause is proper so long as the service charges are used to finance expenditures by the union for 1) collective bargaining; 2) contract-administration and; 3) grievance adjustment. Finally, non-members are entitled to an appropriate remedy if proof is established that the union *used* such service fees improperly. *Id.* It is important to note that the *Abood* decision upheld the payment of a service fee equal to the total union dues and established a right for the non-members in objecting to the improper use of such fees.

A recent decision by Mr. Justice Boehm of the New York Supreme Court in *Haag v. Hogue*, (December 7, 1982) Index #12665/80, (appended hereto), is of compelling import. In *Haag*, the Plaintiff employee/non-members of a school district sought to challenge the constitutionality of a state statute authorizing a service fee deduction so long as a refund procedure is established. *Id.* at 1. Such refund procedure is to diminish a non-member's dues on a pro rata basis with the amount of monies expended by the union on political and ideological causes.[3] Justice Boehm writing for the majority dealt with several key issues raised by the Plaintiff that were alleged to make the collection of the service fee impermissible and unconstitutional. *Id.* at 3. Mr. Justice Boehm found that a charge of service fees equal to the union dues paid by members is not impermissible without explicit proof of the improper *use* of such fees. *Id.* at 5-6. In fact, Justice Boehm found "the exaction of a fee equal to dues is not unconstitutional per se."

Further, in examining the constitutionality of a possible temporary improper use of service fees by the union Justice Boehm added, "until a prima facie showing of unauthorized use is made there is no reason to deny the Association control over the full fee." *Haag at 8.* Continuing the Supreme Court of New York found the appellants' assertions "irreconcilable with the Supreme Court's clear mandate that a bargaining representative not be denied, even temporarily, the contribution to which it is entitled from every employee it represents (citations omitted). *Id.* at 10.

Finally, Justice Boehm addresses the issue of a union rebate procedure and its alleged improper burden of proof on the payors. In finding no express limitation binding

[3] Note that the complaint in *Haag* alleges a *use* of service fees for improper purposes over the objection of the Plaintiffs. *Id.* at 2.

appellants to an internal union remedy Justice Boehm found the "burden of justification is a condition precedent to the *use*, not the *receipt*, of plaintiffs' funds." *Id.* at 12. Justice Boehm adds that "Preliminary to any relief there must be a showing of how the Association spends the money it collects. Then and only then, would the trial court be in a position to determine whether the other questions here raised requires resolution and, if so, to proceed accordingly." *Id.* at 14.

In the present action it is clear that no service fees have been paid to the TFT by the several Defendants. Common sense dictates the question of how individuals may object to the impermissible and unconstitutional use of fees not yet paid to TFT? Prior precedent leaves no doubt that objections are properly raised to the use of service fees and not the receipt.

It may well be argued that such improper use may be analogized by comparison to TFT's expenditures is specious and abhorrent. This Court will not speculate as to what activities TFT might have allocated such service fees had the Defendants chosen to utilize the objection procedure of the agency-shop agreement or to pay the full fee. Precedent clearly establishes the right of TFT to the receipt of a service fee from the several Defendants without delay.

The issue of Defendants' failure to utilize the rebate procedure as an estoppel to further objection is not fairly before this court. If Defendants wish to object to an improper use of their service fees they must pay them to TFT. If the use of such fees is thought to be improper then an action is properly brought to challenge the impropriety.[4]

[4] Defendants' cites to *Ball v. City of Detroit*, 269 N.W. 2d 607, (1978); *Seay v. McDonnell Douglas*, 533 F.2d 1126 (1976) and *Beck v. CWA*, 468 F.

This court can only exhort both parties to address the ideal implicit in Mr. Justice Stewart's search for a remedy in *Abood*,

> '...Because appellee union has adopted an internal union remedy for dissenters, it may be appropriate to defer further judicial proceedings pending the voluntary utilization by the parties of that internal remedy as a possible means of settling the dispute.' *Abood, supra* at 240.

Mr. Justice Stewart acknowledges the necessity for the utilization of voluntary rebate procedures to prevent extensive and antagonistic litigation. This action is ripe for a calm and reasoned application of the rebate procedure to assuage the objections of the several Defendants. If in good faith, the rebate procedure can avoid unnecessary litigation and expense. The issue of whether Defendants may avoid the objection procedure, pay in the service fees to TFT and then bring an action is not presented. As the time for payment and objection has passed by the express terms of the binding agency-shop agreement, TFT is entitled to immediate payment of the service fees.

JUDGMENT ENTRY

Therefore, it is hereby ORDERED for the reasons cited above, that judgment be rendered against the several Defendants; Ellen Gibney, Joyce Coulter, Shirley Duckins, Barbara Gillmore, Catherine Greebe, Gary Samples and Verdis Fields for $192.00 per Defendant plus statutory

Supp. 87 (D. Ma. 1979) are proper for the issue of amount of ajudicated permissible use of service fees of objecting non-members. However, the present case is factually distinguished in that no service fees have been paid by the several Defendants herein to justify the calculations of *Beck*, nor the adjudication of the propriety of rebate procedures and use of fees in *Seay* and *Ball*.

interest from September 1, 1982 and costs. Further, Plaintiff's request for punitive damages is denied due to the insufficiency of the evidence. Finally, the counterclaim of the several Defendants is dismissed as without merit for the reasons cited above.

Aug. 15, 1983

F.A. Pietrykowski

Judge

/s/ By M. L. Restivo

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, *1984 TERM*
City of Columbus. *To wit: June 6, 1984*

No. 84-537

TOLEDO FEDERATION OF TEACHERS,
Appellee,

vs.

ELLEN GIBNEY et al.,
Appellants.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS for Lucas County TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by National Right to Work Legal Defense Foundation.

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this 21st day of June, 1984.

JAMES Wm. KELLY, *Clerk*

IN THE OHIO COURT OF APPEALS
SIXTH APPELLATE DISTRICT

Toledo Federation of Teachers
Plaintiff-Appellee,

v.

Ellen Gibney, *et al.*
Defendants-Appellants.

S.C. No. 84-537
C.A. No. L-83-303
C.P. No. CV-82-2665

(Filed July 26, 1984)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Pursuant to United States Supreme Court Rule 10, notice is hereby given that Ellen Gibney, *et al.*, appeal to the Supreme Court of the United States from the final judgment entered by the Ohio Court of Appeals for the Sixth Appellate District affirming an award of damages to the Toledo Federation of Teachers entered in this action on February 3, 1984.

This appeal is taken pursuant to the provisions of 28 U.S.C. § 1257 (2).

Respectfully submitted,

/s/ David T. Bryant

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal to the Supreme Court of the United States was served this 24th day of July, 1984 by depositing it in a United States mail-box, with first-class postage prepaid, addressed to each of the following:

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Lucas County Courthouse
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/s/ David T. Bryant
David T. Bryant

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS.
CLERK

(2)

CASE NO. 84-349

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1983

ELLEN GIBNEY, et al.,

Appellants

-vs-

TOLEDO FEDERATION OF TEACHERS, et al.

Appellees

* * * * *

On Appeal From the Court of Appeals
of Ohio, Sixth Appellate District

* * * * *

APPELLEE TOLEDO FEDERATION OF TEACHERS' MOTION TO DISMISS OR AFFIRM

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22pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. STATEMENT 1

II. ARGUMENT 3

III. CONCLUSION 14

CERTIFICATION 15

APPENDIX

Ohio Revised Code §4117.09 . . 16

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. STATEMENT 1

II. ARGUMENT 3

III. CONCLUSION 14

CERTIFICATION 15

APPENDIX

Ohio Revised Code §2117.09 . . 16

TABLE OF AUTHORITIES

Cases:

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 12

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-241 (1937) 4

Commercial Cable Co. v. Burleson, 250 U.S. 360 (1919) 5

Ellis v. Railway Clerks, ___ U.S. ___, 104 S. Ct. 1883 (1984) 5, 13

Local No. 8-6 v. Missouri, 361 U.S. 365 (1960) 5

Machinists v. Street, 367 U.S. 740, 771 (1961) 11-12

United States v. Alaska S.S. Co., 253 U.S. 113 (1920) 5

Statutory Material:

Ohio Revised Code:

§3313.17 3

§3313.20 3

§3313.33 3

§3313.47 3

TABLE OF AUTHORITIES

Cases:

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 12

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-241 (1937) 4

Commercial Cable Co. v. Burleson, 250 U.S. 360 (1919) 5

Ellis v. Railway Clerks, U.S. _____, 104 S. Ct. 1883 (1984) 5, 13

Local No. 8-6 v. Missouri, 361 U.S. 365 (1960) 5

Machinists v. Street, 367 U.S. 740, 771 (1961) 11-12

United States v. Alaska S.S. Co., 253 U.S. 113 (1920) 5

Statutory Material:

Ohio Revised Code:

§3313.17 3

§3313.20 3

§3313.33 3

§3313.47 3

TABLE OF AUTHORITIES
(continued)

Statutory Material (continued):

Ohio Revised Code:

§3319.08 3

Chapter 4117 . . . . . Passim

United States Code:

28 U.S.C. §1257(2) 3

42 U.S.C. §1983 2

TABLE OF AUTHORITIES
(continued)

Statutory Material (continued):

Ohio Revised Code:

§3319.08 3

Chapter 4117 . . . . . Passim

United States Code:

28 U.S.C. §1257(2) 3

42 U.S.C. §1983 2

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, appellee Toledo Federation of Teachers moves the Court to dismiss as moot the appeal herein or, in the alternative, to affirm the judgment of the Sixth District Court of Appeals of Ohio on the ground that this appeal presents no substantial federal question not previously decided by this Court.

I. STATEMENT

Appellee Toledo Federation of Teachers (hereinafter referred to as TFT) is the exclusive bargaining agent for all teachers employed by appellee Toledo Board of Education (hereinafter referred to as the Board). Appellants are teachers employed by the Board and are not members of TFT.

Pursuant to a collective bargaining agreement between TFT and the Board, effective August 1, 1982, all teachers who were not members of TFT were required to pay an agency shop fee to TFT in order to share in the costs of collective bargaining. TFT notified all non-member teachers of

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, appellee Toledo Federation of Teachers moves the Court to dismiss as moot the appeal herein or, in the alternative, to affirm the judgment of the Sixth District Court of Appeals of Ohio on the ground that this appeal presents no substantial federal question not previously decided by this Court.

I. STATEMENT

Appellee Toledo Federation of Teachers (hereinafter referred to as TFT) is the exclusive bargaining agent for all teachers employed by appellee Toledo Board of Education (hereinafter referred to as the Board). Appellants are teachers employed by the Board and are not members of TFT.

Pursuant to a collective bargaining agreement between TFT and the Board, effective August 1, 1982, all teachers who were not members of TFT were required to pay an agency shop fee to TFT in order to share in the costs of collective bargaining. TFT notified all non-member teachers of

their obligation to pay an agency shop fee and explained the deadline and procedures for payment. TFT further notified all non-member teachers of an internal rebate procedure and their right to a rebate, upon written objection, of the portion of their fee which would otherwise be expended for political or ideological causes unrelated to collective bargaining.

Each appellant refused to pay their agency shop fee. None of the appellants ever submitted a written objection to TFT about spending a portion of their fee for political or ideological causes nor did any of them avail themselves to TFT's internal rebate procedure.

On January 11, 1983, TFT filed suit seeking to collect the agency fee appellants owed. Appellants answered by denying the debt and counterclaimed pursuant to 42 U.S.C. §1983, acknowledging TFT's right to collect an agency shop fee but challenging TFT's alleged "intent of using" the fee "in part for political and ideological causes."

TFT prevailed by summary judgment in the trial court on August 15, 1983. The trial court was affirmed by the Sixth District Court of Appeals of Ohio on February 3, 1984 and the Ohio Supreme Court denied further review on June 6, 1984.

II. ARGUMENT

Appellants claim that this Court should exercise jurisdiction over this appeal pursuant to 28 U.S.C. §1257(2), challenging the Sixth District Court of Appeals' alleged construction of Sections 3313.17, 3313.20, 3313.33, 3313.47 and 3319.08 of the Ohio Revised Code. (Jurisdictional Statement, p. 3) According to appellants, the Sixth District Court of Appeals "held that these statutes authorize a judgment for TFT which licensed the use of non-union members' fees for purposes other than collective bargaining." (Id. at 4) (Emphasis added.)

Appellants' challenge to the alleged construction of the various sections of Chapter 3313 and §3319.08 of the Ohio Revised Code is now moot

[1] because, as appellants acknowledge in their Jurisdictional Statement at page 3, the state of Ohio, effective April 1, 1984, adopted a comprehensive statutory plan under Chapter 4117 of the Ohio Revised Code covering agency shop fees. Accordingly, Ohio currently has a "statute specifically authorizing or prohibiting agency shop fees." (Id. at 4) However, Ohio's Public

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[1] As the Court explained in Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-241 (1937):

> A justifiable controversy is thus distinguished from a difference or dispute of a hypothetical nature; from one that is academic or moot. The controvery must be definite and concrete touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. [citations omitted.]

because, as appellants acknowledge in their Jurisdictional Statement at page 3, the state of Ohio, effective April 1, 1934, adopted a comprehensive statutory plan under Chapter 4117 of the Ohio Revised Code covering agency shop fees. Accordingly, Ohio currently has a "statute specifically authorizing or prohibiting agency shop fees." (Id. at 4) However, Ohio's Public

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Employee Collective Bargaining statute (R.C. Chapter 4117) has not been drawn into question in the case at bar nor tested in the courts below. Appellants' appeal is therefore moot. See: Commercial Cable Co. v. Burleson, 250 U.S. 360 (1919); United States v. Alaska S. S. Co., 253 U.S. 113 (1920); Local No. 8-6 v. Missouri, 361 U.S. 365 (1960).

Appellants' appeal is moot on an alternative ground. In addition to Ohio's enactment of Ohio Revised Code Chapter 4117, effective April 1, 1984, TFT has implemented a new internal rebate procedure in light of O.R.C. Chapter 4117 and this court's decision in Ellis v. Railway Clerks, ____ U.S.____, 104 S. Ct. 1883 (1984).

Pursuant to O.R.C. §4117.09 (set forth in the Appendix) and the collective bargaining agreement between TFT and the Board, all non-union teachers are charged an agency shop fee which is collected by the Board by ten monthly payroll deductions beginning in September of the school year. The Board then processes and forwards each payroll

Employee Collective Bargaining statute (R.C. Chapter 4117) has not been drawn into question in the case at bar nor tested in the courts below. Appellants' appeal is therefore moot. See: Coin-mercial Cable Co. v. Burleson, 250 U.S. 360 (1919); United States v. Alaska S. S. Co., 253 U.S. 113 (1920); Local No. 8-6 v. Missouri, 361 U.S. 363 (1960).

Appellants' appeal is moot on an alternative ground. In addition to Ohio's enactment of Ohio Revised Code Chapter 4117, effective April 1, 1984, TPT has implemented a new internal rebate procedure in light of O.R.C. Chapter 4117 and this court's decision in Ellis v. Railway Clerks, _____ U.S. _____, 104 S. Ct. 1883 (1984).

Pursuant to O.R.C. §4117.09 (set forth in the Appendix) and the collective bargaining agreement between TPT and the Board, all non-union teachers are charged an agency shop fee which is collected by the Board by ten monthly payroll deductions beginning in September of the school year. The Board then processes and forwards each payroll

deduction to TFT with the first such payment being received at the beginning of October.

Under TFT's new internal rebate procedure, a non-member teacher who desires a rebate for that portion of the agency shop fee that would otherwise be spent on "partisan politics or ideological causes not germane to the work of employee organizations in the realm of collective bargaining" (O.R.C. §4117.09(c)), simply needs to send written notification to TFT on or before October 1 of the school year.[2] Upon receipt of such notification and subsequent receipt of one-tenth of the agency shop fee from the Board, TFT immediately transfers an objecting non-member teacher's rebate to an interest bearing escrow account pending actual refund of the rebate. If the objecting non-member wishes to further object to the amount of the

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[2] Otherwise an objecting non-member teacher can send written notice to TFT within 20 days of his/her first day on the job.

rebate, the rebate funds remain in the interest bearing escrow account pending a resolution under TFT's internal rebate procedure which now provides for review by the new Ohio State Employment Relations Board pursuant to O.R.C. 4117.09(c).

As an example, for the current 1984-85 school year, teachers who do not belong to TFT and who desired a rebate of that portion of their agency shop fee which would otherwise be used for political and ideological activities unrelated to collective bargaining, notified TFT in writing by October 1, 1984. On October 3, 1984, TFT received from the Board a check for the first installment of union dues and agency shop fees. [3] On October 5, 1984, TFT cashed the check and immediately deposited into a separate interest bearing escrow

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[3] The Board sends TFT one lump sum check after it has made each of the ten payroll deductions. The check includes both the union dues and agency shop fees collected.

account those funds which are to be rebated to objecting non-member teachers. If a non-member teacher decides to object to the amount of the rebate, the rebate funds will remain in the escrow account pending the actual refund.

Appellants' basis for their appeal at bar is their allegation that TFT would have used a portion of their agency shop fees for political or ideological causes unrelated to collective bargaining. (Jurisdictional Statement, pgs. 2, 4, 11, 12, 13, 14, 16-17) As appellants explain, their concern was that "TFT will have the unfettered use of their fees over a long period of time, subjecting them to the certainty that in the interim their refunds will be spent on political and ideological activities unrelated to collective bargaining." (Id. at 16) (Emphasis added.)

Regardless of the validity of appellants' concern over the use of their agency shop fee under TFT's old internal rebate procedure, their concern is presently clearly moot under TFT's new internal rebate procedure as discussed above. An objecting

non-member teacher's rebate is currently immediately transferred into an interest bearing escrow account upon receipt of one-tenth of the agency shop fee from the Board. The rebate remains in the interest bearing escrow account until the rebate is actually refunded to the objecting non-member teacher. Thus, under the new internal rebate system, TFT never even has the opportunity to use objecting non-member teachers' refunds, even temporarily, for political or ideological causes unrelated to collective bargaining. Therefore, appellants' allegation that TFT "forced loans to subsidize their political and ideological activities unrelated to collective bargaining" is moot since TFT immediately and permanently segregates rebate funds in a separate interest bearing escrow account. (Id. at 12)

It is important to note that the case at bar arose over appellants' failure to pay any of their 1982-83 school year agency shop fees. [4]

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[4] Similiarly, none of the appellants ever notified TFT prior to

Recently, in late August 1984, appellants did pay in their 1982-83 agency shop fee and have already received a rebate. Thus, TFT never had the opportunity to use any portion of appellants' 1982-83 agency shop fees for political and ideological causes unrelated to collective bargaining.

Notwithstanding that appellants' appeal should be dismissed for being moot, the decision of the Sixth District Court of Appeals of Ohio should be affirmed because the appeal presents no substantial federal questions not previously decided by this Court.

The Sixth District Court of Appeals held in the syllabus of its Opinion that:

> 1. Where a labor organization is the exclusive representative of the employees or a class of the employees of an employer, the labor organization may properly assess and collect a service fee from non-member employees,

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(cont.) [4] filing their Answer and Counterclaim that they desired to exercise the right to a rebate of a portion of their agency shop fee or availed themselves to TFT's internal rebate procedure.

represented thereby, in accordance with the terms of its collective bargaining agreement. Jefferson Area Teachers Assn. v. Lockwood (1982), 69 Ohio St. 2d 671, followed.

2. The use of such service fees for the promotion of political activities, over objection, is, however, violative of the non-member's first amendment rights. Abood v. Detroit Board of Education (1977), 431 U.S. 209, followed.

3. Where a refund procedure by which a non-member may protest the use of any portion of his service fee for political activities is provided, such procedural remedy must be exhausted prior to the assertion of any claim regarding such expenditures in a judicial proceeding.

(Jurisdictional Statement, Appendix p. 2a.)

In their Jurisdictional Statement and in the courts below, appellants have not challenged the first two paragraphs of the Sixth District Court of Appeals' syllabus, but instead, challenge the third paragraph because they allege that the lower court's decision allows TFT to unconstitutionally use a portion of their agency shop fee for political or ideological causes unrelated to collective bargaining. "In other words, [appellants'] grievance

stems from the spending of their funds for purposes not authorized by the [Constitution] in the face of their objection, not from the enforcement of the union-shop agreement by the mere collection of funds." Machinists v. Street, 367 U.S. 740, 771 (1961)

In Abood v. Detroit Board of Education, 431 U.S. 209 (1977), this Court stated that courts must fashion a remedy to a non-member teacher's objection to the use of an agency shop fee which does not restrict the "union's ability to require every employee to contribute to the cost of collective bargaining activities." (Id. at 237.) In fact, Justice Stevens in his concurring opinion specifically recognized the use of establishing a union's internal rebate procedure to avoid the risk that objecting non-members' funds would be used, even temporarily, to finance ideological activities unrelated to collective bargaining. Id. at 244. Of course, as discussed above, TFT has established an internal rebate procedure which does avoid the risk that objecting non-member teachers' agency

fees will be used, even temporarily, for unconstitutional purposes.

More recently, this Court in Ellis v. Railway Clerks, ____ U.S. ____, 104 S. Ct. 1883 (1984), ruled upon the statutory adequacy of a union's "pure" [5] rebate procedure under the Railway Labor Act. [6] Specifically, the Court held that given the existence of "acceptable alternatives," a pure rebate scheme violated the Railway Labor Act because it allowed an objecting non-members' funds

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[5] A "pure" rebate procedure is one in which the union exacts and uses full dues and refunds months later that portion of the dues which the union was not allowed to exact in the first place. Ellis, at 1890.

[6] Ellis did make clear that the Court's previous decisions in Street, supra, Abood, supra, and Railway Clerks v. Allen, 373 U.S. 113 (1963), had not passed upon the "statutory or constitutional adequacy of the suggested remedies" for non-union members who object to the use of their agency shop fees for political and ideological causes unrelated to collective bargaining. Ellis, at 1890.

to be temporarily put to improper uses. Id., at 1890. One of the "acceptable alternatives" to a pure rebate system was an internal rebate procedure which implemented an interest bearing escrow account. Id. Again, as discussed above, TFT has implemented an interest bearing account in their internal rebate procedure to avoid even the opportunity to temporarily put an objecting non-member teacher's agency shop fee to improper uses.

Thus, the Ohio Sixth District Court of Appeals' ruling that a non-member teacher must avail him or herself to a union's internal rebate procedure before protesting the use of a portion of an agency shop fee in a judicial proceeding is clearly consistent with this Court's prior rulings and should, therefore, be affirmed.

III. CONCLUSION

For the foregoing reasons, the appeal should be dismissed or the judgment of the court below affirmed.

Respectfully submitted,

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Counsel For Appellee

CERTIFICATION

This is to certify that a copy of the Appellee Toledo Federation of Teachers' Motion to Dismiss or Affirm was mailed by ordinary U.S. Mail this ____ day of November, 1984 to David T. Bryant, National Right to Work Legal Defense Foundation, Inc., 8001 Braddock Road, Suite 600, Springfield, Virginia 22160; to Frank T. Pizza, 1000 National Bank Building, Toledo, Ohio 43604; and to Susan Hayest, Office of the Attorney General, 34 North High Street, 2d Floor, Columbus, Ohio 43215.

David M. Schnorf

§4117.09 [Written agreement executed by both parties.]

(A) The parties to any collective bargaining agreement shall reduce the agreement to writing and both execute it.

(B) The agreement shall contain a provision that:

(1) Provides for a grievance procedure which may culminate with final and binding arbitration of unresolved grievances, and disputed interpretations of agreements, and which is valid and enforceable under its terms when entered into in accordance with Chapter 4117. of the Revised Code. No publication thereof is required to make it effective. A party to the agreement may bring suits for violation of agreements or the enforcement of an award by an arbitrator in the court of common pleas of any county wherein a party resides or transacts business.

(2) Authorizes the public employer to deduct the periodic dues, initiation fees, and assessments of members of the exclusive representative upon presentation of a written deduction authorization by the employee.

(C) The agreement may contain a provision that requires as a condition of employment, on or after a mutually agreed upon probationary period or sixty days following the beginning of employment, whichever is less, or the effective date of a collective bargaining agreement, whichever is later, that the employees in the unit who are not members of the employee organization pay to the employee organization a fair share fee. The arrangement does not require any employee to become a member of the employee organization, nor shall fair share fees exceed dues paid by members of the employee organization who are in the same bargaining unit. Any public employee organiation representing public employees pursuant to Chapter 4117. of the Revised Code shall prescribe an internal procedure to determine a rebate, if any, for nonmembers

which conforms to federal law, provided a nonmember makes a timely demand on the employee organization. Absent arbitrary and capricious action, such determination is conclusive on the parties except that a challenge to such determination may be filed with the state employment relations board within thirty days of the determination date specifying the arbitrary or capricious nature of the determination and the state employment relations board shall review the rebate determination and decide whether it was arbitrary or capricious. The deduction of a fair share fee by the public employer from the payroll check of the employee and its payment to the employee organization is automatic and does not require the written authorization of the employee.

The internal rebate procedure shall provide for a rebate of expenditures in support of partisan politics or ideological causes not germaine (sic) to the work of employee organizations in the realm of collective bargaining.

Any public employee who is a member of and adheres to established and traditional tenents or teachings of a bona fide religion or religious body which has historically held conscientious objections to joining or financially supporting an employee organization and which is exempt from taxation under the provisions of the Internal Revenue Code shall not be required to join or financially support any employee organization as a condition of employment. Upon submission of proper proof of religious conviction to the state employment relations board, the board shall declare the employee exempt from becoming a member of or financially supporting an employee organization. The employee shall be required, in lieu of the fair share fee, to pay an amount of money equal to such fair share fee to a nonreligious charitable fund exempt from taxation under section 501(c)(3) of the Internal Revenue Code mutually agreed upon by the employee and the representative of the employee organization to which the employee would otherwise be required to pay the fair share fee. The

employee shall furnish to the employee organization written receipts evidencing such payment, and failure to make such payment or furnish such receipts shall subject the employee to the same sanctions as would nonpayment of dues under the applicable collective bargaining agreement.

No public employer shall agree to a provision requiring that a public employee become a member of an employee organization as a condition for securing or retaining employment.

(D) No agreement shall contain an expiration date that is later than three years from the date of execution. The parties may extend any agreement, but the extensions do not affect the expiration date of the original agreement.

(3)

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NOV 15 1984
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Appellees.

On Appeal From the Court of Appeals of Ohio, Sixth Appellate District

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OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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10 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THE CONTROVERSY BETWEEN THE TOLEDO FEDERATION OF TEACHERS AND THE PETITIONERS IS NOT MOOT 1

II. THE FEDERAL QUESTION PRESENTED BY THIS APPEAL IS SUBSTANTIAL 3

CONCLUSION 4

TABLE OF AUTHORITIES

Cases *Page*

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 2, 3, 4

Ellis v. Railway Clerks, ____ U.S. ____, 104 S. Ct. 1883 (1984) 1, 2, 4

Hudson v. Chicago Teachers Union, ____ F.2d ____, 117 L.R.R.M. 2314 (7th Cir. 1984)..... 2-3

Jibson v. White Cloud Education Association, No. 83-1816, 53 U.S.L.W. 3268 (U.S. October 9, 1984) 4

Kempner v. Local 2077, State, County and Municipal Employees, No. 84-361, 53 U.S.L.W. ____ (U.S. October 29, 1984) 4

McDonald v. City of West Branch, ____ U.S. ____, 104 S. Ct. 1799 (1984)..... 2

Patsy v. Florida Board of Regents, 457 U.S. 496 (1982) 2

Powell v. McCormack, 395 U.S. 486 (1969) 1

United Public Workers v. Mitchell, 330 U.S. 75 (1947) 2

Statutes *Page*

Ohio Revised Code

§ 3313.17 3

§ 3313.20 3

§ 3313.33 3

§ 3313.47 3

§ 3319.08 3

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OPPOSITION TO MOTION TO DISMISS OR AFFIRM

I. THE CONTROVERSY BETWEEN THE TOLEDO FEDERATION OF TEACHERS AND THE PETITIONERS IS NOT MOOT.

The Toledo Federation of Teachers (TFT) argues that the case is moot because Ohio's new collective bargaining statute, effective April 1, 1984, was not drawn in question or tested in the courts below. That argument indicates a lack of understanding of the test for mootness. A case is not moot "as long as the parties have a concrete interest, however small, in the outcome of the litigation." *Ellis v. Railway Clerks*, ____ U.S. ____, 104 S. Ct. 1883, 1889 (1984); *see Powell v. McCormack*, 395 U.S. 486, 496 (1969). The issues in this case concern the costs incurred by TFT in school year 1982-83 for activities for which the Petitioners can be forced to pay. The new Ohio statute did not settle the controversy concerning

the amount owed. Concrete legal issues remain to be decided and, therefore, the case is not moot. *See United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947).

TFT also argues that the case is moot because of its new internal rebate procedure. But, one of the "live" issues in this case is whether the Petitioners can be forced to resort to their adversary as a prerequisite to obtaining a judicial determination of their rights. Surely, that question is not settled by TFT's creation of such a remedy. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and *Ellis, supra*, make it clear that questions concerning the permissible amount of agency-shop fees are justiciable questions which should be resolved in a judicial forum. *See McDonald v. City of West Branch*, ____ U.S. ____, 104 S. Ct. 1799 (1984); *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982). Also since Petitioners will never be satisfied with or accept TFT's determination of the amount due to it, the existence of the internal rebate procedure does not settle the controversy and the case is not moot for that reason as well.

In addition, the new procedure is not a part of the record. As described in TFT's motion, however, it appears to be woefully inadequate because it provides for an escrow of only the amounts TFT estimates it will spend for political and ideological purposes unrelated to collective bargaining and it does not provide for a reduction of future fees. Since the entire fee is not placed in the escrow account, the new system is not "a procedure which will avoid the risk that [Petitioner's] funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." *Abood*, 431 U.S. at 244 (Stevens, J., concurring); *and see Hudson v.*

Chicago Teachers Union, ____ F.2d ____, 117 L.R.R.M. 2314, 2320-21 (7th Cir. 1984).

II. THE FEDERAL QUESTION PRESENTED BY THIS APPEAL IS SUBSTANTIAL.

The opinion below affirms a judgment against the Petitioners for a fee equal to union dues and it requires the Petitioners to utilize TFT's internal rebate procedure as a prerequisite to a judicial determination of the amount TFT spends for non-collective bargaining purposes. The opinion places no restriction whatsoever on the uses to which TFT may put the money after the judgment is paid.

This interpretation of the Ohio statutes involved, O.R.C. §§ 3313.17, 3313.20, 3313.33, 3313.47, and 3319.08, is substantively the same as the statutory interpretation before the Court in the *Abood* case and it raises the same issues. While the Ohio Court of Appeals cited *Abood*, it did not follow the holding in that case. Rather, it opted for a method that causes the constitutional injury which *Abood* sought to prevent. The Court of Appeals affirmed a judgment for a fee equal to dues without permitting the Petitioners to litigate whether that amount included amounts which had been spent for political and ideological purposes. And the judgment required the Petitioners to utilize TFT's internal procedures as a prerequisite to a judicial determination of the amount of their liability. The refusal to permit the litigation of defenses going to the amount of liability is contrary to this Court's holding in *Abood*, 431 U.S. at 241-42. The requirement to utilize TFT's internal rebate

procedure is contrary to this Court's holding in *Ellis*, 104 S. Ct. at 1890.

TFT is correct when it states at pages 9 and 10 of its motion that the Petitioners have paid the judgment against them and have received a rebate in an amount solely determined by TFT. Also, as required by the judgment of the Court of Appeals, they are in the process of exhausting TFT's appeal procedure in order to comply with the judgment's prerequisite for judicial relief. All of which substantiates Petitioners' claim that TFT was not entitled to summary judgment in the first place and reinforces their claim of current constitutional injury caused by the failure of the Ohio Court of Appeals to follow *Abood, supra*, and to anticipate the result in *Ellis, supra.*

This case differs from *Jibson v. White Cloud Education Association*, No. 83-1816, 53 U.S.L.W. 3268 (U.S. October 9, 1984), and *Kempner v. Local 2077, State, County and Municipal Employees*, No. 84-361, 53 U.S.L.W. ____ (U.S. October 29, 1984), because it involves a money judgment against the Petitioners for a fee in excess of that to which TFT constitutionally is entitled and the Petitioners tried to, but were prevented from, raising constitutional defenses in the trial leading up to that judgment. Therefore, this case raises the same constitutional questions that were present in *Abood* and they are just as substantial now as they were then.

CONCLUSION

For the reasons stated here and in the jurisdictional statement, the Court should summarily reverse the deci-

sion below and declare the Ohio agency-shop statutes unconstitutional as applied. Further, the Court should remand the case with directions which require TFT to prove the amount of its entitlement before any judgment is awarded and which permit the teachers to conduct discovery and litigate the issues raised by their defenses and counterclaim. In the alternative, the Court should note probable jurisdiction of the appeal and set it down for plenary briefing and argument.

Respectfully submitted,

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November 15, 1984